United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-7042

To be argued by
CHARLES A. LATORELLA, JR.

B

United States Court of Appeals
FOR THE SECOND CIRCUIT

P/S

TAXI WEEKLY, INC.,
Plaintiff-Appellee,

against

METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE MCINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN, LEONARD SCHAFFRAN, and BENJAMIN BOTWINICK,
Defendants-Appellants,

and

TAXICAB BUREAU, INC., EMPIRE TAXICAB COOPERATIVE, INC., INDEPENDENT TAXICAB OWNERS GUILD, INC., UNITED TAXI OWNERS GUILD, INC., SALVATORE BARON, ESTATE OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,
Defendants.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, BOTWINICK

CHARLES A. LATORELLA, JR.
Attorney for
Defendant-Appellant Botwinick
500 Fifth Avenue
New York, New York 10036
(212) 391-0053

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y. —966—6570

TABLE OF CONTENTS

PAGE

TABLE OF CASES CITED

STATUTES AND RULES CITED

OTHER AUTHORITIES CITED

United States Court of Appeals

FOR THE SECOND CIRCUIT

TAXI WEEKLY, INC.,

Plaintiff-Appellee,

against

METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE MCINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN, LEONARD SCHAFFRAN, and BENJAMIN BOTWINICK,

Defendants-Appellants,

and

TAXICAB BUREAU, INC., EMPIRE TAXICAB COOPERATIVE, INC., INDEPENDENT TAXICAB OWNERS GUILD, INC., UNITED TAXI OWNERS GUILD, INC., SALVATORE BARON, ESTATE OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,

Defendants.

BRIEF OF DEFENDANT-APPELLANT BOTWINICK

Preliminary Statement

This is an appeal by Benjamin Botwinick from a judgment of the United States District Court for the Southern District of New York (GRIESA, J.), entered January 19, 1976, as well as from an order of the same Court, entered April 2, 1976 (Botwinick Appendix, pp. 1a-2a),* which

---

* The "Botwinick Appendix" consists solely of the opinion and order of the District Court, filed April 2, 1976, and is annexed to this brief. A separate "Joint Appendix" has been filed.

denied Mr. Botwinick's motion for judgment notwithstanding the verdict (F.R.C.P., Rule 50) or in the alternative, for a new trial (F.R.C.P., Rule 59). Mr. Botwinick's time to appeal was suspended pending the decision of the District Court on his motion (F.R.A.P., Rule 4), which was made on January 5, 1976, prior to entry of judgment. Notice of appeal on his behalf was filed on April 12, 1976.

The judgment appealed from was against a number of other persons connected with Metropolitan Taxicab Board of Trade (the "Defendants-Appellants") as well as against Mr. Botwinick. By order of this Court entered April 15, 1976, Mr. Botwinick's appeal was consolidated with the appeal by the Defendants-Appellants.

The brief of the Defendants-Appellants is respectfully adopted on behalf of Mr. Botwinick, and this brief will be confined to arguments relating solely to him.

Nature of the Case

The statement of the Nature of the Case in the brief of Defendants-Appellants is respectfully adopted. Mr. Botwinick is an accountant who was associated on a part-time basis with Metropolitan Taxicab Board of Trade, and acted as its spokesman on some public issues.

Statement of Issues

The issues are as stated in the Brief of Defendants-Appellants, with the following additional issues relating solely to Mr. Botwinick:

1. Was the evidence against Botwinick sufficient to establish a *prima facie* case that he was a knowing and intentional member of the alleged conspiracy?

2. In any event, should defendant Botwinick be granted a new trial because of the errors in summations of counsel and in the Court's charge to the jury?

Statement of Facts

The Statement of Facts in the Brief of Defendants-Appellants is respectfully adopted here. This Statement of Facts will relate solely to the question of Mr. Botwinick's involvement in the alleged conspiracy.

The Evidence Against Botwinick

Plaintiff complains that he was the victim of defendants' conspiracy to drive him out of business, and thus to restrain trade. Defendants' activities, as claimed by the plaintiff (A1065-1096),* are as follows:

(a) Requesting that Taxi Weekly print the position of the fleet owners concerning the fare increase;

(b) Inducing Mr. Wysinger to sever business relations with Mr. Peterman;

(c) Concerted cancellations of subscriptions by fleet owners following a meeting at Mr. Botwinick's office on July 13, 1964;

(d) Spreading rumors concerning control of Taxi Weekly by Morris Markin;

(e) Inducing cancellations of advertisements;

(f) Withholdng news;

(g) Establishment of "The New York Hackman"; and

(h) Coordination of the above activities by the leadership of Metropolitan, including the "ringleader", Mr. Botwinick.

---

* References in parentheses preceded by the letter "A" are to pages in the Joint Appendix. As previously noted, the opinion of the District Court filed April 2, 1976, is printed in the "Botwinick Appendix", annexed to this brief.

In this Statement of Facts, the evidence concerning each of these categories will be analyzed solely with a view to the involvement (or lack of involvement) of Mr. Botwinick in those activities.

A. Requesting that Taxi Weekly print the position of the fleet owners concerning the fare increase.

At a meeting in Mr. Botwinick's office on April 17, 1964, Mr. Botwinick indicated to Mr. Peterman that Taxi Weekly had not been properly reporting the position of the fleet owners, and suggested that their position should be featured more prominently in the newspaper (A103-110, 111-116).

This was obviously well within the ordinary scope of Mr. Botwinick's activities since, as Mr. Peterman testified, Mr. Botwinick was the "spokesman" for the fleet owners (A103-104). In itself, this incident constitutes no evidence whatsoever of Mr. Botwinick's alleged complicity in the alleged conspiracy. It certainly cannot be considered unusual for any interested person, or spokesman for interested persons, to urge his position upon a newspaper editor, and still less so in this case, when Taxi Weekly, by Mr. Peterman's own testimony, had printed many stories on the proposed taxi fare increase in the spring of 1964 (A115).

B. Inducing Mr. Wysinger to sever business relations with Mr. Peterman.

Although much argument was devoted by plaintiff's counsel to the alleged plot to induce Mr. Wysinger to force Mr. Peterman out of Taxi Weekly, the sole evidence introduced by plaintiff in this regard is as follows:

i) Mr. Botwinick told Mr. Peterman, at the meeting of April 17, 1964, in Mr. Botwinick's office, that he had "heard it on the grapevine" that there were difficulties or

differences between Mr. Peterman and Mr. Wysinger. Mr. Peterman testified that he was greatly surprised to hear this, since, apart from the normal disputes and disagreements among partners, he was not aware at that time of any serious difficulty between himself and Wysinger (A110, 116-118).

ii) Two months later, on June 15, 1964, Mr. Wysinger commenced a dissolution proceeding in the State courts, alleging in his petition that there were difficulties between himself and Mr. Peterman, and that Mr. Peterman was not getting along with the fleet owners (A118, 895, 898).

There is not one item of evidence in the record, either direct or hearsay, that Mr. Botwinick ever induced or attempted to induce Mr. Wysinger to dissolve his business relationship with Mr. Peterman. Indeed, Mr. Wysinger testified directly to the contrary in his deposition (A891).

Plaintiff nevertheless professed to find a sinister connection between Mr. Botwinick's allegedly suspicious foreknowledge of difficulties between Mr. Peterman and Mr. Wysinger, on the one hand, and Wysinger's subsequent activities in attempting to dissolve the business (A1071-72).

In his summation, Mr. Wentz l (plaintiff's attorney) referred to a conversation between Mr. Murstein and Mr. Peterman wherein Mr. Murstein "said that yes, he knew something was being done to Mr. Peterman about this Wysinger business back in '64." (A1088). This apparently was a refererence to testimony which had been stricken from the record as being too vague (A161).

C. The July 13, 1964, meeting at Mr. Botwinick's office, followed by cancellations of subscriptions on the next day.

While conceding that the case is almost entirely circumstantial, plaintiff repeatedly stressed the sequence of events—the meeting of "all the defendants" in Mr. Botwinick's office on July 13, followed by a rash of cancellations the next day. Thus, reasons the plaintiff, the rash of cancellations on July 14 could not have been a coincidence (A1073-74).

However, no connection whatsoever was established between the July 13 meeting and the July 14 cancellations.

By plaintiff's concession, there is no evidence of what went on at the July 13 meeting, other than the minutes of UTOG and ITOC, which indicate a perfectly legitimate and innocent purpose for the meeting (Plaintiff's Exhibits 9, 10, A1430, 1431-2).

Not one of the people who were at the July 13 meeting in Mr. Botwinick's office cancelled a subscription on July 14. (Compare the list of persons present at the July 13 meeting, set forth in Plaintiff's Exhibit 9 [A1430], with the list of persons who cancelled subscriptions on July 14, Plaintiff's Exhibit 42 [A1466-68]).

An attempt to draw an inference of concerted action among certain of the defendants from the cancellations of July 14 cannot suffice to establish a connection with the meeting in Mr. Botwinick's office of July 13. Even if one could draw an inference of "getting together" from the circumstance that a number of fleet owners cancelled their subscriptions on July 14, there is not one shred of evidence in this record which even tends to establish that the "getting together" took place at, or stemmed from the meeting of July 13 in Mr. Botwinick's office. Other defendants who were at the July 13 meeting (Mr. Baron and Mr. Alfred Marks) were exonerated by the jury.

There is no evidence whatsoever that Mr. Botwinick ever had a subscription to Taxi Weekly, much less cancelled one, nor is there any evidence in the record that he had had anything whatsoever to do with cancellation of subscriptions.

Metropolitan Taxicab Board of Trade did not cancel its subscription until October 14, 1964, three months after the cancellations of July 14 (Plaintiff's Exhibit 42 [A1466-68]). There is no evidence that Mr. Botwinick cancelled the subscription on behalf of Metropolitan, or even knew that it was going to be cancelled. Mr. Plotsky testified in his deposition (A466-467) that Mr. Botwinick would not have had authority to cancel Metropolitan's subscription. Indeed, Mr. Plotsky testified that the cancellation was probably done by Mr. McIntyre, who was not even present at the meeting of July 13 in Botwinick's office.

In summary then, no connection whatsoever appears in the record between the meeting of July 13 and the cancellation of July 14. Nevertheless, there were repeated arguments by plaintiff's counsel to that effect, to the point where this alleged (and non-existent) connection became the very touchstone of the plaintiff's case (A1073-75, 1086-90, 1091-94).

D. Spreading rumors concerning control of Taxi Weekly by Morris Markin.

Nowhere in the record is there any evidence, by way of testimony or otherwise, that Mr. Botwinick ever participated in spreading rumors concerning the alleged connection between Morris Markin and Taxi Weekly. Nevertheless, by a series of errors, the jury was given to understand that such evidence was in the record, and could be considered against Mr. Botwinick.

In his summation, Mr. McGrath, counsel for certain other defendants, referred to a conversation between Mr. Peterman and Mr. Baron, which took place in 1966. That conversation was tape-recorded by Mr. Peterman,

and the transcript was read into the record (A913, 917). Mr. McGrath stated that Mr. Botwinick was present at that conversation (A1053). The fact is that the person who was present at the Baron-Peterman conversation of July 20, 1966, was *Ben Bine*, not *Ben Botwinick*. Review of the record discloses that Ben Bine was an officer of UTOG, "presently deceased" (A913, 917). Obviously, Mr. McGrath meant to say *Ben Bine*, but the jury heard *"Ben Botwinick"*.

This error apparently was never corrected, and in the minds of the jurors could well have supplied a connection between Mr. Botwinick and the alleged conspiracy.

This was further reinforced by the Court's charge, wherein it was stated that plaintiff contended that Mr. Botwinick admitted to Mr. Peterman that he had spread the Markin rumor in 1965 (A1135). There was no testimony by Mr. Peterman or anyone else to this effect.

E. Inducing cancellations of advertisements.

Plaintiff did not claim, nor is there any evidence in the record, that Mr. Botwinick had anything to do with cancellations of advertisements.

F. Withholding news.

Mr. Peterman testified that in the autumn of 1964, he interviewed Mr. Botwinick in order to obtain a statement concerning an announcement by Mayor Wagner, and that Mr. Botwinick refused comment (A 184). This was well within Mr. Botwinick's First Amendment rights, and in any event could not suffice to raise any inference that Mr. Botwinick knowingly and intentionally participated in the alleged conspiracy.

G. Establishment of "The New York Hackman".

There is no evidence in the record to indicate that Mr. Botwinick had anything whatsoever to do with the establishment or promotion of "The New York Hackman". That newspaper was founded by Messrs. McIntyre and Zeff in the fall of 1964.

H. Mr. Botwinick's "leadership position" in Metropolitan Taxicab Board of Trade.

—Mr. Peterman allegedly being told to "see Mr. Botwinick".

—Mr. Botwinick as "the ringleader".

Even though plaintiff testified that Mr. Botwinick was the "Executive Director" of Metropolitan Taxicab Board of Trade, there was no testimony by Mr. Peterman that Mr. Botwinick had been the person that he was told to see in order to "straighten himself out" (i.e., obtain re-subscriptions from the fleet owners) (A 154-183). Indeed, to the contrary, Mr. Peterman testified that the "Suchmans" had told him in 1966 to see one "High Saltpeter" (actually Hy Salpeter), then Executive Director of the Metropolitan Taxicab Board of Trade (A 175). In Mr. Peterman's conversation with Milton Marks, the reference was to "they" or "them", but there was no mention of Mr. Botwinick (A 176-181). Nevertheless, in his summation, Mr. Wentzel stated the following (A1092):

> "And he [Mr. Botwinick] was the man that everybody said, 'You got to go see Botwinick if you want me to re-subscribe to your paper.' "

Apart from these glaring errors, it is obvious that the mere fact that a person holds office in an organization does not make him personally responsible for the activities of that organization, unless it be demonstrated that he participated in those activities, or authorized them, or other-

wise was directly, knowingly and intentionally involved. There is not a shred of evidence to that effect in this record. Certainly, neither the description of Mr. Botwinick as "Executive Director" of Metropolitan (nor any of the evidence) would begin to justify counsel's description of Mr. Botwinick in his summation as "the ringleader" (A1091).

In the charge to the jury, the Court indicated that Mr. Botwinick's "leadership position" could be considered as an element in the chain of circumstantial evidence implicating him in the conspiracy to cancel subscriptions (A1129-30).

In his summation, counsel for plaintiff referred to Mr. Murstein's reason for cancelling his subscription as follows (A1088):

> "He [Mr. Murstein] was going to follow the decision of Metropolitan. He was going to let them make up his mind for him. Somewhere [sic] up there like Mr. Botwinick said do this and he jumped."

Nowhere in Mr. Murstein's deposition (A 456-64) or in Mr. Peterman's transcript of his conversation with Mr. Murstein (A 154-161) is Mr. Botwinick's name mentioned in this connection.

POINT I

Since the evidence was totally insufficient to establish that Botwinick was a knowing or intentional member of the alleged conspiracy, plaintiff failed to make out a *prima facie* case against Botwinick.

In considering whether the jury's verdict was proper, the Court must accept the evidence most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom. *Tropea* v. *Shell Oil Co.*, 307 F.2d 757,

761 (2d Cir., 1962). However, as this Court has held in *Tropea, supra* (307 F. 2d, at p. 765):

> "Evidence sufficient to support a verdict always depends upon the factual peculiarities of the particular lawsuit."

"Speculation cannot supply the place of proof," *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573, 578 (1951), and where equally probable inferences can be drawn from a given circumstance or set of circumstances, it is speculation to choose between them. *Jaramillo* v. *U.S.*, 357 F. Supp. 172, 175-76 (S.D.N.Y., 1973). Circumstantial evidence of a defendant's complicity in a conspiracy is proper and is entitled to great weight, but even where the Court has a suspicion that certain defendants "may very well have been involved", the court will not find against them where there is "no evidence to connect them." *Robins* v. *Schonfeld*, 326 F. Supp. 525, 530 (S.D.N.Y., 1971). The plaintiff must establish a *prima facie* case against each defendant whom he seeks to hold liable, *Panico* v. *American Export Lines, Inc.*, 213 F. Supp. 116 (S.D.N.Y., 1962), which must be proven by more than a mere scintilla of evidence. *McCaffrey* v. *Great Atlantic & Pacific Tea Co.*, 103 F. 2d 329 (2d Cir. 1939).

While an unfavorable inference may ordinarily be drawn from the failure of a party to testify, no such inference may be drawn where the party having the burden of proof has failed to establish a *prima facie* case. *San Antonio* v. *Timko*, 368 F. 2d 983 (2d Cir. 1966); 31 C.J.S. Evidence, § 156, p. 862. In any event, such inference does not take the place of evidence of material facts, nor does it shift the burden of proof. 31 C.J.S., Evidence, § 156, p. 863.

In this case, examination of the record demonstrates that the evidence against Mr. Botwinick was entirely circumstantial, rather than direct; that each of the circum-

stances purportedly linking him to the conspiracy was susceptible of an alternative and far more probable innocent inference; and that all of the circumstances taken together were likewise capable of a more probable and innocent inference. It was indeed speculation for the jury to find against Mr. Botwinick.

As demonstrated in the analysis of the evidence against Mr. Botwinick in the Statement of Facts, *supra*, the evidence against him was astonishingly thin. While conceding that there was no direct evidence of Mr. Botwinick's complicity, the plaintiff presented evidence of the following circumstances:

(a) There was a meeting in Mr. Botwinick's office on July 13, 1964, attended by representatives of other taxicab organizations, followed by numerous cancellations of subscriptions by fleet owners on the following day. No connection whatsoever was established between the meeting in Mr. Botwinick's office and the cancellations the following day;

(b) Mr. Botwinick urged Mr. Peterman to emphasize the position of the fleet owners on the fare increase at the meeting in his office on April 17, 1964;

(c) Mr. Botwinick stated that he had "heard it on the grapevine" that Mr. Peterman was having difficulties with Mr. Wysinger, to plaintiff's (alleged) surprise. This was followed by Mr. Wysinger's petition for dissolution of Taxi Weekly, Inc., on June 15, 1964. From this the jury was to conclude that Mr. Botwinick somehow had something to do with inducing Mr. Wysinger to attempt a dissolution, even though Mr. Wysinger himself denies this;

(d) Mr. Botwinick "withheld news" by refusing comment on one occasion (with no evidence whatsoever that he had agreed with any other party to do so); and

(e) Mr. Botwinick was in a "leadership position" with Metropolitan Taxicab Board of Trade (but was

not the same "Executive Director" whom Mr. Peterman was told to see in order to "straighten himself out").

No additional evidence was adduced against Mr. Botwinick, but counsel for the plaintiff nevertheless supplied additional "links" in his summation, without any basis whatsoever in the record (See Point II, *infra*).

There is no evidence in this record of any statements or admissions by alleged co-conspirators which implicated Mr. Botwinick in any way, despite the assertions of counsel for the plaintiff in his summation, and despite the obvious error of counsel for co-defendants. In any event, any such statements would not be binding on Mr. Botwinick in the absence of other evidence establishing that he was a knowing and intentional participant in the alleged conspiracy. See *U.S.* v. *Calabro*, 449 F. 2d 885 (2d Cir., 1971), cert. den. 404 U.S. 1047, cert. den. 405 U.S. 928; *U.S.* v. *Bentvena*, 319 F. 2d 916 (2d Cir., 1963), cert. den. 375 U.S. 940, reh. den. 375 U.S. 989, reh. den. 377 U.S. 913, reh. den. 397 U.S. 928; *U.S.* v. *Carminati*, 247 F. 2d 640 (2d Cir., 1957), cert. den. 355 U.S. 883.

It is worthy of note that the accused's mere association with the alleged conspirators, without more, is insufficient to establish the necessary foundation for admissibility of co-conspirators' statements. *U.S.* v. *Ragland*, 375 F. 2d 471 (2d Cir., 1967), cert. den. 390 U.S. 925.

As has been demonstrated in the Statement of Facts, *supra*, each of the items of evidence against Mr. Botwinick was capable of an alternative, more probable—indeed compelling—inference consistent with innocence.

All of these circumstances taken together do not in combination give rise to any adverse inference. It is perfectly consistent with innocence for a spokesman for a trade organization to urge the organization's views upon a newspaper; to hear "on the grapevine" that Mr. Peterman was having trouble with Mr. Wysinger; to hold a meeting in his

office with the representatives of other organizations, particularly when there was no evidence, direct or circumstantial, to connect that meeting with cancellations of subscriptions on the following day; to refuse comment to a newsman; and to be described as a "leader" of Metropolitan, when there was no evidence to indicate that he had authorized or was involved in any of the acts complained of by the plaintiff, such as cancelling subscriptions, inducing advertisers to cancel, or founding "The New York Hackman".

The fact which plaintiff cannot escape is that Mr. Botwinick was not involved in any of the "nefarious" activities which allegedly damaged the plaintiff.

The "conspiratorial meeting" of July 13, 1964 in Mr. Botwinick's office was not shown by even one shred of evidence, direct or circumstantial, to have been the "meeting" (if any) which produced the cancellations of subscriptions on the following day. Mere alleged "foreknowledge" of difficulties between Mr. Peterman and Mr. Wysinger does not begin to constitute evidence that Mr. Botwinick (or anyone else, for that matter) induced or attempted to induce Mr. Wysinger to sever relations with Mr. Peterman.

Mr. Botwinick's alleged withholding of news was so clearly within his First Amendment rights that it should not have been considered as any evidence whatsoever of complicity in the conspiracy, especially since the record is utterly devoid of any evidence that this was done pursuant to direction or agreement, or otherwise in furtherance of the alleged illegal conspiracy.

As the Court said in *Panico* v. *American Export Lines, Inc.*, 213 F. Supp. 116, 121-22 (S.D.N.Y., 1962):

> "To summarize, I am compelled to find that the plaintiff has fallen so far short of satisfying his bur-

den of proof in this case, that it would be inconsistent with substantial justice to allow this verdict to stand."

The trial Court should have directed a verdict in favor of Mr. Botwinick. At the least, the trial Court should have granted Mr. Botwinick's motion for judgment notwithstanding the verdict.

POINT II

Errors in the summations of counsel, as well as in the Court's charge, necessitate at least the granting of a new trial to defendant Botwinick. Despite the possible omission of defense counsel to object specifically to some of these errors, the Court should nevertheless consider them under the "plain error" rule.

A.

It has previously been demonstrated (*supra*, pp. 5, 7-10) that several errors occurred in the summations of counsel, as well as in the Court's charge to the jury. Any one of these errors, standing alone, would probably constitute ample grounds for a new trial as to defendant Botwinick. In combination, however, and particularly in light of the extremely thin evidence against Mr. Botwinick, a new trial is mandated, in the event that the Court does not direct judgment in Mr. Botwinick's favor. These errors were:

(1) Reference by counsel for a co-defendant to Mr. Botwinick as having been present at a conversation that could have been considered conspiratorial, when in fact he meant to say "Ben Bine" (*supra*, pp. 7-8);

(2) The Court's submission to the jury of the question whether Mr. Botwinick had admitted to Mr. Peterman that he had spread the Markin rumors, when in fact there was no evidence in the record to this effect (*supra*, p. 8);

(3) References by plaintiff's counsel (Mr. Wentzel) to: (a) Mr. Murstein's allegation of Mr. Botwinick's complicity in the Wysinger matter, when such evidence had been stricken from the record (A1088, *supra*, p. 5); (b) Mr. Wentzel's reference to Mr. Murstein's alleged action in cancelling his subscription at Mr. Botwinick's direction (A1088, *supra*, p. 10); and (c) Mr. Wentzel's statement that Mr. Botwinick was the man whom "everybody said" Peterman would have to see in order to obtain resubscriptions (A1092, *supra*, p. 9);

(4) The Court's charge on conspiracy (A1129-30, *supra*, p. 10), which could have been interpreted by the jury as giving force to Mr. Wentzel's statement concerning Murstein's following Botwinick's orders in cancelling his subscription.

The extreme paucity of the evidence against Mr. Botwinick gave added—indeed, devastating—force to these errors. They were the last things the jury heard before deliberating after a trial lasting several days. It is impossible to state that the jury could not have been influenced by these errors, or that such influence, if it occurred, was "harmless". This is given particular emphasis by the fact that the jury released defendants Baron, Alfred Marks, ITOC and UTOG. As this Court held in *San Antonio* v. *Timko*, *supra*, 368 F. 2d 983, 986 (2d Cir., 1966):

> "When we combine this episode with the previous improprieties in summation and the exceedingly thin character of the evidence, we are convinced the judgment cannot be allowed to stand."

B.

Mr. Nessen's exceptions to the charge were clearly sufficient to cover the Court's charge on Mr. Botwinick's "leadership role" in the alleged conspiracy to cancel sub-

scriptions (A1153-54, 1129-30). Those objections were also probably sufficient in detail to cover the other errors mentioned above.

If, however, the Court should find that trial counsel's objections were insufficient to comply with F.R.C.P. Rule 51 concerning any or all of these errors, it is respectfully urged that the Court should consider these matters under the "plain error" rule.

Briefly stated, the "plain error" rule is that serious and fundamental errors which go to the integrity and fairness of the trial may be considered in granting a new trial, despite the inadvertence of trial counsel in failing to make timely objection. *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F. 2d 294 (2d Cir. 1962), where this Court said (at pp. 297-98):

> "But we must also remain cognizant of the responsibility of an appellate court to insure that trial court judgments have been rendered in conformity with applicable rules of law. When the integrity of a trial court's judgment has been called into question by a substantial departure from those rules, an appellate court cannot put aside this responsibility merely because of the inadvertence of appellant's counsel at trial."

Accord, *Modave* v. *Long Island Jewish Medical Center*, 501 F. 2d 1065, 1072 (2d Cir. 1974); *Blier* v. *U.S. Lines Co.*, 286 F. 2d 920 (2d Cir. 1961), cert. den. 368 U.S. 836.

The net effect of the errors demonstrated above was to deprive Mr. Botwinick of a fair trial. If this court does not grant judgment in Mr. Botwinick's favor, then, at the very least, he should be granted a new trial.

CONCLUSION

The judgment of the District Court should be reversed and judgment should be granted in favor of the defendant Botwinick, or in the alternative, he should be granted a new trial.

Dated: New York, New York, April 19, 1976.

Respectfully submitted,

CHARLES A. LATORELLA, JR.,
Attorney for Defendant-Appellant,
Benjamin Botwinick
500 Fifth Avenue
New York, New York 10036
Tel. No. (212) 391-0053

APPENDIX

Opinion and order of the U.S. District Court for the Southern District of New York (*Griesa*, J.), filed April 2, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2827

TAXI WEEKLY, INC.,

Plaintiff,

v.

METROPOLITAN TAXICAB BOARD OF TRADE, INC., et al.,

Defendants.

MEMORANDUM

GRIESA, J.

Defendant Botwinick moves for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motion is denied.

None of the three basic grounds of the motion is valid. There was ample evidence to support the verdict against Botwinick. As to the two alleged factual errors said to have been made by counsel in summations, and by the court in the charge, the answer is that the jury was clearly instructed that their recollection of the evidence governed, and no exceptions to the relevant portions of the charge were made at the trial. There was no "plain error" such

as to require a new trial. *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F. 2d 294 (2d Cir. 1962).

The motion is denied.

So ordered.

Dated: New York, New York
April 2, 1976

THOMAS P. GRIESA
Thomas P. Griesa
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TAXI WEEKLY, INC.,

Plaintiff-Appellee,

against

METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE McINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN, LEONARD SCHAFFRAN, and BENJAMIN BOTWINICK,

Defendants-Appellants,

and

TAXICAB BUREAU, INC., EMPIRE TAXICAB COOPERATIVE, INC., INDEPENDENT TAXICAB OWNERS GUILD, INC., UNITED TAXI OWNERS GUILD, INC., SALVATORE BARON, ESTATE OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,

Defendants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York, New York
That on April 19, 1976, he served 2 copies of Brief and Appendix of Defendant-Appellant Botwinick

ROSENMAN COLIN FREUND LEWIS & COHEN,
Attorneys for Defendants-Appellants
575 Madison Avenue
New York, New York 10022

CASEY, LANE & MITTENDORF,
Attorneys for Plaintiff-Appellee
26 Broadway
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

. . . Juan . . Delgado . . .

Sworn to before me this
19th day of April , 19 76

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 19 77